FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 17 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 713

CHRISTOS VASSOS,

Petitioner,

against

SOCIETÀ TRANS-OCEANICA CANOPUS, S. A., MAR-TRADE CORPORATION and the S.S. CANOPUS, her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
15 Park Row,
New York 38, N. Y.,
Proctor for Petitioner.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of Facts	2
Reasons for Granting the Writ	3
POINT I—The Court below was in error, in effect, holding that a dismissal of part of a complaint constituted an appealable judgment or order	4
POINT II—The Court below was in error in declaring a dismissal not on the merits as res judicata	5
POINT III—It is axiomatic and requires no argument that a refusal to entertain jurisdiction does not constitute a trial on the merits	6
POINT IV—Any statute of limitation could not begin to run until January 6, 1960, the date of the final judgment herein	11
Conclusion	11
APPENDIX:	
Opinion of the United States Court of Appeals for the Second Circuit	13
Judgment	14

Cases Cited

Buchholz v. United States Fire Ins. Co., 53 N. Y. S. 2d 608, 269 App. Div. 49	10
Cosmopolitan Shipping Company v. McAllister, 337 U. S. 783	4, 7
Erie v. Tompkins, 304 U. S. 64, 58 S. Ct. 817	8

PAGE

Hawn v. Pope & Talbot, 346 U. S. 406, 74 S. Ct. 202 6

Lauritzen v. Larsen, 345 U. S. 571, 73 S. Ct. 921 6

Lowry v. International Brotherhood, etc., 220 F. 2d 546 8

Meade v. Phillips, 27 F. Supp. 801 9

Mehrer v. North Ninth Lumber Co. Inc., 275 App. Div. 1059, 92 N. Y. S. 2d 178 8

People ex rel. Calderazzo, et al. v. Stiner, et al., 271 App. Div. 841, 66 N. Y. S. 2d 48 9

Piasecik v. Trader Navigation Co., 2 Cir., 178 F. 2d 886 ..... 2, 5

Schnerb v. Caterpillar Tractor Co., 24 F. 2d 377 (C. C. A. 2d 1928) 10

Shaw v. United States Fidelity & Guaranty Co., 101 F. 2d 92 10

Taylor v. Atlantic Maritime Company, 2 Cir. 179 F. 2d 597 4

Western Electric Co. v. Pacent Reproducer Corporation, 37 F. 2d 14 ..... 2, 5

Statutes Cited

New York Civil Practice Act, Section 23 ....2, 3, 6, 8, 9, 10

Rule 60(b), Federal Rules of Civil Procedure 2, 5, 11

Rule 60(b), subd. (5), Federal Rules of Civil Procedure 6

28 U. S. C. A. 1254(1) 2

28 U. S. C. A. 1265(1) 2

46 U. S. C. A. 688 (Jones Act) 2, 5

IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No:

CHRISTOS VASSOS,

Petitioner,

against

SOCIETA TRANS-OCEANIC CANOPUS, S. A., MAR-TRADE CORPORATION and the S.S. CANOPUS, her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 19, 1959.

Opinion Below

The opinion of the United States Court of Appeals decided November 19, 1959 is reported in 272 Fed. 2nd 182 (Appendix, p. 13).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 19, 1959.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. Section 1254(1).

Questions Presented

Whether or not Rule 60(b) of the Federal Rules of Civil Procedure has been correctly interpreted.

Is the computation of the one year limitation within which to reopen a judgment in a civil action completely controlled by the Federal Rule of Civil Procedure 60(b), as held by the Court below, where but some of the causes of action in the complaint have been dismissed, or is the time tolled until there has been a final determination of the remaining cause of action, as held by the Court below in the cases of *Western Electric Co.* v. *Pacent Reproducer Corporation*, 37 F. 2d 14, and *Piascik* v. *Trader Navigation Co.*, 2 Cir., 178 F. 2d 886?

Is a summary judgment predicated on the fact that a litigant has filed an action under the Jones Act, 46 U. S. C. A. 688, *res adjudicata* so as to bar subsequent action by way of a libel predicated on general maritime law?

Are the provisions of Section 23 of the New York Civil Practice Act nullified by the provisions of Rule 60(b) of the Federal Rules of Civil Procedure?

Statement of Facts

Libelant, Christos Vassos, an alien seaman, filed a libel on August 11, 1955 to recover damages sustained by said libelant on May 15, 1949. Libelant was employed as an Assistant Steward on the S.S. Canopus, a vessel of Panamanian registry. That as a result of said employment

he contracted tuberculosis. That libelant brought this action against the named respondent and also included in said action a libel in rem against the vessel S.S. CANOPUS. The respondents excepted to the libel and said exceptions were sustained in an opinion by Judge Bicks, 143 F. Supp. 945, and a judgment entered. In an appeal to the Court of Appeals, the judgment of the lower Court was affirmed. This appeal is taken from said affirmance.

Reasons for Granting the Writ

The Court below has rendered a decision which fixes a one year limitation of time within which to seek relief from a judgment dismissing some causes of action in a complaint where the entire controversy has not been terminated, which is in conflict with this Court's previous decisions holding that an appeal cannot be taken before there is a final determination.

The Court below has rendered a decision which, in effect, nullifies the provisions of Section 23 of the New York Civil Practice Act.

The Court below has rendered a decision which, in effect, completely destroys a substantial remedy available to litigants in a State Court, denied to him if he invokes the jurisdiction of a Federal Court.

There has been a complete and radical departure from the uniform holdings by this Court that litigants should be granted an opportunity to have their cases tried on the merits and not summarily disposed of without trial and on strictly technical grounds.

POINT I

The Court below was in error, in effect, holding that a dismissal of part of a complaint constituted an appealable judgment or order.[1]

On the 6th day of January, 1960 a final judgment was entered in favor of Christos Vassos on his remaining cause of action for maintenance and cure.

---

[1] Honorable David N. Edelstein's decision did not by its very language constitute final determination of the action.

Vassos v. Mar-Trade USDC—SDNY

EDELSTEIN, *J.*

Law Journal, December 30, 1954

Civ. 75-250

December 28th, 1954.

This motion is, I assume, under Rule 12(b)(6) and since affidavits were submitted and considered, it must be treated as one for summary judgment. The motion will be granted for judgment dismissing the first and third causes of action against the defendant Soc. Trans. Oceanica Canopus S.A. on the ground that they are barred by the statute of limitations. No authority has been submitted for the proposition that the statute was tolled because the defendant was out of the jurisdiction, nor do I know of any. Indeed, it does not even appear that the defendant was unavailable for service. Nor have any facts been presented to indicate that service on the defendant Mar-Trade was equivalent to service on Trans-Oceanica. Moreover, insofar as the first and third causes of action may be based on the maritime law of unseaworthiness, the affidavit submitted on behalf of the plaintiff presents no facts which would warrant the exercise of discretion to entertain jurisdiction in this court of an action between aliens. See *Taylor* v. *Atlantic Maritime Co.* (2 Cir.), 179 F. 2d 597, 598. The motion will be granted for judgment dismissing the fourth cause of action against Trans-Oceanica on the ground of the failure to state a claim upon which relief can be granted. And the motion will be granted for judgment dismissing the complaint against the defendant Mar-Trade Corporation, on the basis of *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783. Aside from a mere conclusory allegation on information and belief, nothing appears to warrant the conclusion that Mar-Trade was anything other than a shore-side agent of the defendant Trans-Oceanica, as indeed, is alleged in the complaint.

DAVID N. EDELSTEIN.

We submit that all prior decisions in this matter constitute intermediary decisions or judgments and that petitioner should not have been barred from any relief available to him on the basis of any statute of limitations, including the provisions of Rule 60(b) of the Federal Rules of Civil Procedure, as held by the Court below in *Western Electric Co. v. Pacent Reproducer Corporation, supra*, wherein Circuit Judge Swan, writing for the Court, states at page 15:

> "(2) It is impossible to consider this order as immediately making a final disposition of the case. Even though the words used are 'Bill dismissed,' a condition, though not in form a condition, is attached thereto. 'With leave to amend' in substance means 'unless the complainants amend'. Clearly the case remains pending in the District Court during the period within which amendment is permitted; and if the plaintiff shall file his amendment within that period, then the case, without further action by the court, will remain pending indefinitely. That a party by his own act may fix the character of the decree—that is, make it final or not, without further action by the court—would seem anomalous, to say the least. We think the order is no more than an order sustaining defendants' motion to dismiss, unless an amendment shall be made, and contemplates and requires another order of absolute dismissal after expiration of the time allowed for amendment, if none has been filed."

See also:

Piascik v. Trader Navigation Co., supra.

POINT II

The Court below was in error in declaring a dismissal not on the merits as *res judicata*.

The causes of action which were dismissed were predicated on statutory provisions of the laws of the State of New York. *Jones Act, supra.*

In view of the decision by this Court in the case of *Lauritzen v. Larsen*, 345 U. S. 571, 73 S. Ct. 921, petitioner had no such cause of action, and therefore the dismissal by Judge Edelstein did not constitute a dismissal on the merits.

The petitioner's subsequent cause of action predicated on general maritime law came squarely within the provisions of Section 23 of the New York Civil Practice Act.

Rule 60(b), subd. (5) of the Federal Rules of Civil Procedure specifically states that equitable principles must be considered in determining whether a judgment should have prospective application.

This Court has repeatedly stated, as held in *Hawn v. Pope & Talbot*, 346 U. S. 406, 74 S. Ct. 202, that actions should be determined on the merits and not by reason of fortuitous circumstances.

POINT III

It is axiomatic and requires no argument that a refusal to entertain jurisdiction does not constitute a trial on the merits.

The prior action was dismissed not on the merits, as is self evident by the decision of Judge Edelstein and further explained in more detail by allegations "Sixteenth" and "Seventeenth" of the libel.[2]

---

[2] "SIXTEENTH: That on the 7th day of May, 1952, libelant filed a complaint against the Mar-Trade Corporation, which was served on the following day. That settlement negotiations continued until on or about the 1st day of October, 1952, at which time the Mar-Trade Corporation served its answer. That on or about the 18th day of November, 1952, libelant, by his then attorney, sought an order permitting the addition of Societa Trans-Oceanica Canopus S.A. as a party defendant and for an order substituting said corporation in

[Continued on page 7]

Petitioner instituted an action within the one year period as provided by Section 23 of the Civil Practice Act of the State of New York.

[Continued from page 6]

place and stead of Mar-Trade Corporation but upon the argument, the motion was granted as modified permitting the addition of Societa Trans-Oceanica Canopus S.A. as a supplemental party defendant. That an amended complaint was filed on January 20, 1953, and a supplemental summons and amended complaint served on defendants on January 21, 1953. That the subject matter of the complaint was predicated on the Jones Act and the provisions thereof as distinguished from the present action which is in no wise predicated upon the Jones Act or any of its provisions. That no action was ever filed against the respondent, S.S. Canopus. The action against Societa Trans-Oceanica Canopus S.A. having been predicated on the provisions of the Jones Act, which has a three year statute of limitations, and which action was not commenced within the three years was dismissed by Honorable David N. Edelstein on the 28th day of December, 1954. The action against the Mar-Trade Corporation, which was sued in the capacity of a general agent and not by reason of its own personal tort, was likewise dismissed on the same date by the same court on the authority of *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783. Neither action had been predicated on unseaworthiness and the respondent, Mar-Trade Corporation, had never been sued for its personal tort as in the case at bar. That by reason of the foregoing, the libelant has been prevented from having his day in court on the merits as the proceedings had on his behalf had been brought under an erroneous concept of the law.

SEVENTEENTH: That by reason of the allegations set forth in the previous paragraph, the libelant was under the impression that his rights were being fully and adequately protected and that he has been guilty of no deliberate delay or laches. That the respondents and their insurance carriers have been on notice of the fact that the libelant was seeking to hold the respondents herein accountable on damages for the accident which is the subject matter of this action since the institution of the original complaint in the civil action aforementioned. That by reason of the service of the summons in the civil action as aforesaid on May 7, 1952, the respondents and each of them have been in a position to, and upon information and belief, have taken all the necessary steps to protect their rights and have in no wise been prejudiced by the delay in starting the above entitled action up to and including the present time."

Section 23 is the legal authority for petitioner instituting an action within one year after the termination of his prior action.

Section 23 of the Civil Practice Act provides as follows:

> "§ 23. *Effect of reversal of judgment or termination of action.* If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies and the cause of action survives, his representative, may commence a new action for the same cause after the expiration of the time so limited and within one year after such a reversal or termination. This section also applies to the workmen's compensation law."

Federal law recognizes that a litigant is entitled to the protection of law as provided by said section.

See:

Lowry v. *International Brotherhood, etc.*, 220 F. 2d 546.

See also:

Erie v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

The authority for a personal injury or death claimant to institute an action within one year after the termination of a prior action under similar circumstances to that wherein appellant's prior action was terminated, is clearly demonstrated by the following decisions.

Mehrer v. *North Ninth Lumber Co. Inc.*, 275 App. Div. 1059, 92 N. Y. S. 2d 178.

In that case an action for wrongful death was commenced by a widow as administratrix. Actually, she had

not been appointed administratrix until a date subsequent to the commencement of the action. Thereafter, a new action was commenced and a motion to dismiss was made by the defendant on the ground that the second action was barred by the statute of limitations. The Court held that the action was timely commenced under the provisions of Section 23 of the Civil Practice Act.

Similarly, in *People ex rel. Calderazzo, et al.* v. *Stiner, et al.*, 271 App. Div. 841, 66 N. Y. S. 2d 48, where a proceeding was dismissed on the ground that it was defective by reason of the failure to include a necessary party defendant in a proceeding to review assessments on real property, the Court permitted the institution of new proceedings within a period of one year from the final determination.

A decision by Judge Conger of the United States District Court for the Southern District of New York in *Meade* v. *Phillips*, 27 F. Supp. 801, is more precisely in point. In that case, the plaintiff in an action for personal injuries, had recovered in the Municipal Court in the Borough of Manhattan. At the time of the defendant's motion to set aside the verdict, plaintiff's counsel, fearful of the running of the statute of limitations, instituted an action in the Federal Court, inasmuch as, if the dismissal of the action for failure of proof had been granted, plaintiff would be without a remedy.

In line with accepted principles, the Court held that the two actions might be so maintained. However, the Court held that the complaint must be dismissed, inasmuch as if the State Appellate Court dismissed the action for failure of proof, the plaintiff would not be harmed in any way for she would have the right to start another action within one year. Of course, if the appeal were denied, the action in the Federal Court would abate.

Therefore, it is clear that a dismissal for failure of proof, if there is deemed to have been one such in the instant proceedings, would not bar the present action.

Petitioner's position, therefore, is even more strongly buttressed inasmuch as it is claimed that there was not even a dismissal for failure of proof in the prior action and that there was not even a consideration of proof.

A fortiori, petitioner may maintain the present action.

The leading case, frequently cited, is *Buchholz* v. *United States Fire Ins. Co.*, 53 N. Y. S. 2d 608, 269 App. Div. 49. In that case, the Court was presented with a situation where a dismissal of an action upon an insurance policy had been affirmed because of a failure to comply with an essential condition precedent. Subsequent to the decision by the Court of Appeals and within one year thereafter, a new action was commenced after tender of performance of the condition precedent. There was no question in that case but that the performance of the condition precedent was a material and essential part of the cause of action.

The Court construed Section 23 of the Civil Practice Act and held that the Act applied. The Court stated on page 610:

> "Here the termination was the decision of the Court of Appeals (or entry of judgment on remittitur) in the earlier action." Citing cases.

As in the instant case, the commencement of the statutory period was the decision of the final Court of Appeals. Furthermore, the Court held that the prior judgment, although final and conclusive on the existing facts, would not estop a subsequent suit brought after the plaintiff tendered performance of the requirement for appraisal.

See also:

Shaw v. *United States Fidelity & Guaranty Co.*, 101 F. 2d 92;

Schnerb v. *Caterpillar Tractor Co.*, 24 F. 2d 377 (C. C. A. 2d 1928).

POINT IV

Any statute of limitation could not begin to run until January 6, 1960, the date of the final judgment herein.

It will be noted that the action of petitioner for maintenance and cure was one of the causes of action alleged in the original complaint.

That cause of action was not determined until January 6, 1960, at which time the final judgment was entered herein, and for that reason no statute of limitation began to run, even under Rule 60(b) of the Federal Rules of Civil Procedure.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACOB RASSNER,
15 Park Row,
New York 38, N. Y.,
Proctor for Petitioner.

APPENDIX

(Opinion of the United States Court of Appeals for the Second Circuit)

Before CLARK, Chief Judge, and HINCKS and WATERMAN, Circuit Judges.

PER CURIAM.

Libelant, an alien seaman, seeks redress for personal injuries allegedly sustained on May 15, 1949, while aboard the S.S. Canopus, a vessel of Panamanian registry. In a reasoned opinion, D.C. S.D.N.Y., 143 F. Supp. 945, Judge Bicks sustained exceptions to the libel because of a previous decision in 1954 by Judge Edelstein in a civil action between the parties as well as in the exercise of independent discretion to decline to accept jurisdiction in this suit between aliens.

[1, 2] Judge Edelstein's dismissal of the civil action was based both upon the statute of limitations and upon a refusal to accept jurisdiction. No appeal was taken from it. Citing N. Y. Civil Practice Act, § 23, appellant tries here to reopen the question of jurisdiction and assert a new theory of liability. But the claim is now completely *res judicata* on jurisdictional as well as substantive issues. Stoll v. Gottlieb, 305 U. S. 165, 170, 171, 59 S. Ct. 134, 83 L. Ed. 104; Angel v. Bullington, 330 U. S. 183, 190, 67 S. Ct. 657, 91 L. Ed. 832; Koziol v. The Fylgia, 2 Cir., 230 F. 2d 651, certiorari denied 352 U. S. 827, 77 S. Ct. 40, 1 L. Ed. 2d 49. And any attempt to reopen a judgment in a civil action is completely controlled by F. R. Civ. P. 60(b), not by state statute.

Judgment affirmed.

(Judgment)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of November, one thousand nine and fifty-nine.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

" CARROLL C. HINCKS,

" STERRY R. WATERMAN,
Circuit Judges.

CHRISTOS VASSOS,
Libelant-Appellant,

—v.—

SOCIETA TRANS-OCEANICA CANOPUS, S.A., MAR-TRADE CORPORATION and the S.S. CANOPUS, her engines, hull, tackle, cargo and her appurtenances thereof,
Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. DANIEL FUSARO,
Clerk.